Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5731

In Re: First American Bank & Trust Company, Bankrupt.

FIRST AMERICAN BANK & TRUST COMPANY,
Appellant,

vs.

HARRY W. GEORGE, Receiver, First American Bank & Trust Company,
Appellee.

JURISDICTIONAL STATEMENT

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In Re: First American Bank & Trust Company, Bankrupt.

FIRST AMERICAN BANK & TRUST COMPANY,
Appellant,

vs.

HARRY W. GEORGE, Receiver, First American Bank &
Trust Company,
Appellee.

JURISDICTIONAL STATEMENT

The appellant, pursuant to Rule 15 of the Supreme Court Rules, hereby submits this jurisdictional statement.

Attached hereto as Exhibits A, B and C respectively, are the Findings of Fact, Conclusions of Law, and Order for Judgment signed by the Honorable Gordon Thompson, Bankruptcy Judge, on the 30th day of June, 1975; the Order of the Honorable Bruce M. VanSickle, District Judge, signed on the 3rd day of September, 1975; and the Opinion of the United States

Court of Appeals for the Eighth Circuit, filed on the 22nd day of July, 1976, all of which held that the appellant fell within the "banking corporation" exception found in Section 4(a) of the Bankruptcy Act.

The appellant on the 25th day of April, 1975, filed a petition for a plan of arrangement under Chapter XI of the Bankruptcy Act. The appellee responded with a motion to dismiss the petition alleging that the appellant was a "banking corporation," and as such fell within the exception to Section 4(a) of the Bankruptcy Act. The Bankruptcy Court granted the motion to dismiss, and the District Court for the District of North Dakota, and the United States Court of Appeals for the Eighth Circuit affirmed the order of the Bankruptcy Judge dismissing the petition of the appellant. The appellant seeks to have this Court review the decision of the United States Court of Appeals for the Eighth Circuit in this case filed on the 22nd day of July, 1976. The notice of appeal was filed with the United States Court of Appeals for the Eighth Circuit on the 19th day of August, 1976. The statutory basis believed to confer jurisdiction upon this Court is found in 11 U.S.C.A., Section 47(c).

The question presented by the appeal is whether the appellant, which is and always has been solely and exclusively a trust company under the laws of the State of North Dakota, is a "banking corporation," and thereby not entitled to the benefits of the Bankruptcy Act.

The material facts pertinent to the consideration of the question presented are not very extensive. The appellant received its original certificate of incorporation under Chapter 6-05 ("Annuity, deposit, surety, trust companies") of the North Dakota Century Code in the name of AMERICAN TRUST COMPANY on February 14, 1963. The certificate was amended on April 24, 1964, changing the name of the appellant to AMERICAN TRUST & DEPOSIT, INC. The certificate was again amended on July 1, 1966, to change the name of the appellant to FIRST AMERICAN BANK & TRUST COMPANY, after the Attorney General of the State of North Dakota had issued an opinion indicating that a trust company could use the word "bank" in its corporate name. The certificate was again amended on January 20, 1967, and on August 8, 1967, increasing the capital stock to One Million Dollars. A certificate of incorporation was issued by the North Dakota Secretary of State, and not by the North Dakota State Banking Board.

The appellant needs no authorization from the North Dakota State Banking Board, or any other state agency, to change the location of its business; nor is it restricted in any way from designating agents or establishing additional offices throughout the State of North Dakota.

The appellant is the only general corporation in the state of North Dakota organized and actually operating exclusively as a trust company under the provisions of Chapter 6-05 of the North Dakota Century Code. The appellant has never accepted any demand deposits, nor has it discounted commercial paper, nor has it bought and sold exchange, nor has it issued drafts or other bills of exchange. It has accepted time deposits in trust. It has operated an active trust business, and it has been continuously licensed as a surety company until the appellee took possession of the appellant's assets. It cashed checks for its customers drawn on the customer's "banking corporation." As of April 28, 1975, the appellant had on deposit 55 trust accounts specifically designated as such. The appellant, in addition to having time deposits in trust, made loans to customers and leased property. The appellant did not exercise its power for abstracting of title.

On or about December 11, 1972, the North Dakota State Banking Board issued its order appointing the appellee as re-

ceiver over the appellant. Said receiver assumed his present control over the appellant on the 4th day of March, 1975. The administration of the appellant by the receiver diminished the assets of the appellant, causing the appellant to apply to the Bankruptcy Court for a plan of arrangement under Chapter XI of the Bankruptcy Act.

The question presented on appeal is so substantial as to require plenary consideration, with briefs on the merits and oral argument for its resolution.

The Constitution of the United States of America granted to Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. Pursuant thereto, the Congress of the United States enacted the Bankruptcy Act, Section 4(a) of which provides that:

> "Any person, except a municipal, railroad, insurance, or banking corporation, or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt." 11 U.S.C.A., Section 22(a).

Since a trust company does not fall within this narrow exception, it is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. The United States Court of Appeals for the Eighth Circuit agreed that a trust company is entitled to the benefits of the Bankruptcy Act in *Gamble v. Daniel*, 39 F. 2d 447 (C.A. 8th 1930).

In the instant case, however, without specifically reversing their holding in *Gamble v. Daniel*, this same Court has held that the appellant, which is solely and exclusively a trust company, is not entitled to the benefits of the Bankruptcy Act, even though it is not a "banking corporation." If Congress had intended that a trust company be excluded from the benefits of the Bankruptcy Act, it would have so indicated as it did with building and loan associations. Accordingly, the substantial

question exists requiring briefs on the merits and oral argument.

Attached hereto as Exhibit D is a copy of the Notice of Appeal to the Supreme Court of the United States, filed with the United States Court of Appeals for the Eighth Circuit, together with a copy of a letter from the Clerk of the United States Court of Appeals for the Eighth Circuit to the Clerk of the Supreme Court of the United States indicating the date upon which the Notice of Appeal was filed.

Very respectfully submitted this 18th day of October, 1976.

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

In Re: First American Bank & Trust Company, Bankrupt.	Bankruptcy No. B1-75-48

Findings of Fact, Conclusions of Law, and Order for Judgment

(Filed June 30, 1975)

The above-entitled matter came on for hearing before the court on the 21st day of May 1975 pursuant to a Notice of Motion and Motion to Dismiss the Chapter XI proceeding filed with this court; the movant, Harry W. George, Administrative Bank Receiver under the laws of the State of North Dakota, being personally present in court with his attorney, Max D. Rosenberg of the firm of Conmy, Rosenberg & Lucas, P. C., Bismarck, North Dakota; representatives of First American Bank & Trust Company being personally present in court along with their attorney, Robert O. Wefald of the firm of Wheeler, Wolf, Wefald & Durick, P.C., of Bismarck, North Dakota; and Frank F. Jestrab and John R. Gordon, Special Assistant Attorneys General, of Williston, North Dakota, having filed a brief herein in support of the motion to dismiss; and the Court having heard oral argument in said matter and being fully advised in the premises, now makes the following Findings of Fact, Conclusions of Law and Order for Judgment:

1

First American Bank & Trust Company, formerly known as American Trust Company, also known as American Trust & Deposit, Inc., is now, and at all times herein mentioned was, a North Dakota corporation incorporated under Chapter 6-05 of the North Dakota Century Code, on or about the 14th day of February 1963.

2

First American Bank & Trust Company has engaged in business as a banking institution in the City of Bismarck since on or about the year of its incorporation, to wit: February 14, 1963.

3

That on December 11, 1972, the State Banking Board of the State of North Dakota, in the exercise of its supervisory power over the alleged bankrupt, made and entered an order appointing Harry W. George receiver of the alleged bankrupt.

4

The order appointing a receiver was based upon findings of fact and conclusions of law that found the alleged bankrupt insolvent and guilty of fraudulent acts.

5

Thereafter the order was affirmed by the Supreme Court of the State of North Dakota and certiorari was thereafter denied by the Supreme Court of the United States by order entered November 18, 1974.

6

From December 14, 1972, until March 6, 1975, the alleged bankrupt had been under a conservatorship of the State Banking Examiner's office.

7

On March 6, 1975, Harry W. George took over as the court-appointed and designated receiver of First American Bank & Trust Company and has been acting in such capacity since that date.

8

The alleged bankrupt did very little business as a trust company, no business as an annuity, surety, fidelity, nor any business in the area of certifying abstracts of title. Its business consisted primarily of receipt of time deposits and making of loans, cashing of checks and issuing of drafts and other bills of exchange.

9

The alleged bankrupt is organized and existing under Chapter 6-05 NDCC. This chapter provides for the organization powers, authority and regulation of annuity, safe deposit, surety and trust companies. That the state of incorporation has provided for liquidation of the type of business engaged in by the alleged bankrupt under Chapter 6-07 NDCC.

10

That the state of incorporation has classified corporations of this type as banking institutions.

Conclusions of Law

The movant, Harry W. George, Administrative Bank Receiver under State of North Dakota proceedings, is entitled to a dismissal of the Chapter XI proceedings filed by the alleged bankrupt on the grounds as follows:

1

The First American Bank & Trust Company, the alleged bankrupt, is engaged in the business of banking as such term is defined under state law.

2

First American Bank & Trust Company, the alleged bankrupt, is under state statute designated as a banking institution, which term is the same as the words banking corporation used in Section IV of the Bankruptcy Act.

3

The alleged bankrupt is a banking corporation as defined under Section IV of the Bankruptcy Act, thereby divesting this court of jurisdiction to act upon the voluntary petition of the alleged bankrupt filed in this matter nor grant relief to the alleged bankrupt under Chapter XI or any other chapter of the Bankruptcy Act.

Order for Judgment

Upon the above and foregoing Findings of Fact and Conclusions of Law it is hereby

Ordered that the voluntary petition of the alleged bankrupt filed under Chapter XI is hereby in all things dismissed; the

court hereby reserves the right to make additional findings in the event of further proceedings in this matter; the order of May 1, 1975, directing the Administrative Receiver to continue the operation of the New Prince Hotel in Bismarck, North Dakota, and the First American Bank & Trust Company of Bismarck, North Dakota, will be continued until further order of this court; the statutory ten-day period for appeal will not run until the order of dismissal is signed and filed by the court.

Dated at Fargo, North Dakota, this 30th day of June 1975.

/s/ GORDON THOMPSON
Bankruptcy Judge

APPENDIX B

In the United States District Court for the District of North Dakota, Southwestern Division

In Re
First American Bank & Trust Company, Bankrupt. } B1-75-48

Order

(Filed September 3, 1975)

Pending is the appeal of the Bankrupt, First American Bank and Trust Company, from that Order of the Bankruptcy Judge dated and entered June 30, 1975, wherein appellant's petition for an arrangement under Chapter XI was dimissed on the grounds that the Court lacked jurisdiction because the Bankrupt is a "banking corporation."

A review of this record in totality satisfies this Court that the Bankruptcy Judge's findings and conclusions upon which his order is based are supported by substantial evidence and are not based upon a substantial error in the proceedings or upon a misapplication of the controlling law. See: *O'Rieley v. Endicott-Johnson Co.*, 297 F.2d 1 (8 Cir. 1961).

Now Therefore, the Court having considered the issues presented by this appeal, and being fully advised in all the premises, it is

Ordered that the Order of the Bankruptcy Judge, dated and entered on June 30, 1975, be, and the same hereby is, in all things, *affirmed*.

Bismarck, North Dakota, this 3 day of September, 1975.

/s/ BRUCE M. VAN SICKLE
Bruce M. Van Sickle, Judge

APPENDIX C

United States Court of Appeals for the Eighth Circuit

No. 75-1771

In Re First American Bank & Trust Company,
Bankrupt.
First American Bank & Trust Company,
Appellant,
v.
Harry W. George, Receiver, First American Bank & Trust Company,
Appellee.
} Appeal from the United States District Court for the District of North Dakota.

Submitted: March 11, 1976

Filed: July 22, 1976

Before Webster and Henley, Circuit Judges, and Talbot Smith, Senior District Judge.*

First American Bank & Trust Company of Bismarck, North Dakota, appeals from an order of the District Court affirming the Bankruptcy Court's dismissal of its petition for Chapter XI arrangement proceedings. The Bankruptcy Court[1] dismissed

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* The Honorable Talbot Smith, Senior Judge, United States District Court for the Eastern District of Michigan, sitting by designation. Webster, Circuit Judge.

[1] The Honorable Gordon C. Thompson, Bankruptcy Judge for the United States District Courts for the Districts of North Dakota and Minnesota.

the petition because it found that First American was a "banking corporation" and thus not entitled to the benefits of Chapter XI, since "banking corporations" are excluded from bankruptcy jurisdiction by Section 4 of the Bankruptcy Act, 11 U.S.C. § 22.

The facts pertinent to this appeal are not extensive. On February 14, 1963, First American received its original certificate of incorporation from the North Dakota Secretary of State in the name of "American Trust Company". First American was incorporated pursuant to Chapter 6-05 of the North Dakota Century Code, which provides for the organization, powers, authority, and regulation of annuity, safe deposit, surety, and trust companies. The certificate was amended on April 24, 1964, to change the name to "American Trust & Deposit, Inc." The certificate was again amended on July 1, 1966, to change the name to the present "First American Bank & Trust Company", after the Attorney General of North Dakota had issued an opinion indicating that trust companies could use the word "bank" in their corporate names.

On December 11, 1972, the North Dakota State Banking Board issued an order appointing a receiver over First American based upon its holding that the institution was insolvent and guilty of fraudulent acts. *See* § 6-0-06 N.D. Cent. Code. This order was affirmed by the Supreme Court of North Dakota. *First American Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509 (N.D.), *cert. denied*, 419 U.S. 1026 (1974). From December 14, 1972, to March 6, 1975, First American was placed under a conservatorship of the State Banking Examiner. The administrative receiver took possession on March 6, 1975, and was in the process of liquidating First American when the voluntary petition in bankruptcy was filed on April 25, 1975.

On April 29 and 30, 1975, motions to dismiss the petition in bankruptcy were filed by Harry W. George, the administrative receiver of First American, and Frank F. Jestrab, a Special Assistant Attorney General of North Dakota representing the State Banking Board. Both motions asserted that the Bankruptcy Court was without jurisdiction to entertain the petition because First American was a "banking corporation" under the exception of Section 4.

The Bankruptcy Court assessed the authority granted First American by Chapter 6-05 of the North Dakota Century Code, and also explored the activity actually engaged in by First American, finding as follows:

> The alleged bankrupt did very little business as a trust company, no business as an annuity, surety, fidelity, nor any business in the area of certifying abstracts of title. Its business consisted primarily of receipt of time deposits and making of loans, cashing of checks and issuing of drafts and other bills of exchange.

Noting that North Dakota has classified corporations such as First American as "banking institutions" and that Chapter 6-07 of the North Dakota Century Code provided for liquidation of this type of enterprise, the Bankruptcy Court held that First American was engaged in the business of "banking" as defined by state law. It further held that the designation "banking institution" under Section 6-01-02 of the North Dakota Century Code was the same as the term "banking corporation" under Section 4 of the Bankruptcy Act, and that First American was therefore a "banking corporation" under Section 4 and excluded from the benefits of the Bankruptcy Act. The petition for bankruptcy was thus dismissed for lack of subject matter jurisdiction.

On appeal, the District Court[2] found the Bankruptcy Court's findings and conclusions to be supported by substantial evidence

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[2] The Honorable Bruce M. Van Sickle, United States District Court for the District of North Dakota.

and not based on substantial error in the proceedings or on a misapplication of controlling law. It accordinglly affirmed by order the judgment of the Bankruptcy Court. First American appeals from this order, contending simply that it is not a "banking corporation" within Section 4 and that it should be entitled to initiate voluntary bankruptcy proceedings.

Section 4 of the Bankruptcy Act, 11 U.S.C. §22, provides in pertinent part:

> (a) Any person, *except* a municipal, railroad, insurance, or *banking corporation* or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> (b) Any * * * moneyed, business, or commercial corporation, *except* a building and loan association, a municipal, railroad, insurance or *banking corporation*, * * * may be adjudged an involuntary bankrupt * * * and shall be subject to the provisions and entitled to the benefits of this title. * * * [emphasis added]

The term "banking corporation", however, is not elsewhere defined. This Court observed in *Gamble v. Daniel*, 39 F.2d 447, 450 (8th Cir.), *appeal dismissed*, 281 U.S. 705, *cert. denied*, 282 U.S. 848 (1930):

> The most natural meaning of the words is: A corporation empowered to do a banking business. * * *
>
> * * * When Congress spoke of "banking corporations" it spoke as of 1910. It used the words in no technical nor special sense, but as they were then ordinarily understood.

For further guidance, the courts have traditionally made reference to the applicable state laws to determine (1) how the entity is classified under state law, (2) what powers are granted to the entity, and (3) what activities actually engaged in were

within the range of lawfully conferred powers. *See Sims v. Fidelity Assur. Ass'n*, 129 F.2d 442, 448-51 (4th Cir. 1942), *aff'd on other grounds*, 318 U.S. 608 (1943); *In re Union Guarantee & Mortgage Co.*, 75 F.2d 984, 985 (2d Cir. 1935); *Woolsey v. Security Trust Co.*, 74 F.2d 334, 335-37 (5th Cir. 1934); *Kansas ex rel. Boynton v. Hayes*, 62 F.2d 597, 598-601 (10th Cir. 1932). *See generally* 1 J. Moore, Colllier on Bankruptcy ¶4.05[2], at 591-93 (14th ed. 1974). The utilization of the incorporating state's classification of the corporation does not mean that state law will be followed literally without regard to an assessment of the actual operation of the petitioning corporation. As stated in *Sims v. Fidelity Assur. Ass'n, supra*, 129 F.2d at 451:

> [The] authorities establish the rule that in determining whether a corporate debtor is a member of the excepted classes, the provisions of the state law must be given predominating influence. This is not to say that the classification of a state statute must be followed literally in every instance without any regard whatsoever to the real activity of the corporate body. The course of decisions, even in the Second Circuit, where perhaps the rule of state classification has been most strongly stated, indicates that the spirit rather than the letter of the local statutes should prevail * * *.

See also Empire Title & Guarantee Co. v. United States, 101 F.2d 69, 71-72 (2d Cir. 1939); *In re Prudence Co.*, 79 F.2d 77, 79-80 (2d Cir.), *cert. denied*, 296 U.S. 646 (1935).

Section 6-01-02 of the North Dakota Century Code provides the following definitions of enterprises related to the business of banking:

* * * * * * *

> 2. "State banking association," any corporation organized under the laws of this state covering state banking associations or savings banks, and all corporations, part-

nerships, firms, or associations whose business in whole or in part consists of the taking of money on deposit, excepting national banks, trust companies, and the Bank of North Dakota;

3. "Banking institution," any bank, trust company, bank and trust company, stock savings bank, or mutual savings bank organized under the laws of this state;

4. "Trust company," any corporation formed for the purpose of transacting business as an annuity, safe deposit, surety, or trust company;

* * * * * * *

8. "Banking," the business of receiving deposits, making loans, discounting commercial paper, issuing drafts, travelers' checks, and similar instruments, handling and making collections, and cashing checks and drafts, or buying and selling exchange;

9. "Bank," any association, firm, or corporation engaged in the business of banking.

In *Nelson v. Dakota Bankers Trust Co.*, 132 N.W.2d 903, 909-12 (N.D. 1964), the North Dakota Supreme Court held that an enterprise incorporated under Chapter 6-05 had no power to engage in "general banking business" as could those banking associations chartered under Chapters 6-02 and 6-03. As *Nelson* holds, and Section 6-01-02 specifically provides, there is a definite distinction under North Dakota law between a "trust company" and a "state banking association," and yet each is a "banking institution." Indeed, in *State ex rel. Holloway v. First American Bank & Trust Co.*, 186 N.W.2d 573, 576 (N.D. 1971), the North Dakota Supreme Court held that First American itself was a "trust company" and not a "state banking association." As will become more apparent, however, this distinction, significant under state law, does not preclude a finding that First American was a "banking corporation" within the meaning of Section 4 of the Bankruptcy Act.

As a "trust company" and "banking institution", First American is subject to the extensive regulatory authority of the State Banking Board. *See State ex rel. Holloway v. First American Bank & Trust Co., supra,* 186 N.W.2d at 578-79. *See also First American Bank & Trust Co. v. Ellwein, supra; First American Bank & Trust Co. v. Ellwein,* 198 N.W.2d 84 (N.D. 1972). Moreover, North Dakota specifically provides for liquidation of the type of business engaged in by First American under Chapter 6-07 of the North Dakota Century Code.[3] While this alone does not require that First American be considered within the Section 4 exception, *see Sims v. Fidelity Assur. Ass'n, supra,* 129 F.2d at 451; *In re Prudence Co.*, supra, 79 F.2d at 79, it is indicative of the state's intent to provide, in the interest of depositors and other members of the public dealing with such an enterprise, the supervisory and administrative safeguards accorded the liquidation of other "banking institutions". *Cf. Woolsey v. Security Trust Co.*, supra, 74 F.2d at 337.[4]

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[3] Chapter 6-07 applies to enterprises organized under Title 6 of the North Dakota Century Code, including "banks" (Chapters 6-02 and 6-03), "annuity, safe deposit, surety, and trust companies" (Chapter 6-05), "credit unions" (Chapter 6-06), "municipal bond banks" (Chapter 6-09.4), and "investment trust companies" (Chapter 6-11).

[4] The congressional purpose in exempting "banking corporations" from the federal bankruptcy laws was identified in *Woolsey v. Security Trust Co.*, 74 F.2d 334, 337 (5th Cir. 1934):

> The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation of the banking corportaions of the country to the well-organized departments of the states and the nation, organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, excludes them. Federal laws provide elaborately for the supervision and liquidation of natural banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection aflorded by direct governmental supervision and control. It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate

In its operation as a "banking institution", First National exercises substantial powers pursuant to Chapter 6-05 of the North Dakota Century Code. They include, as stated in Section 6-05-08:

[T]he power and authority:

1. * * * [T]o loan money and to purchase notes, bonds, mortgages, and other evidences of indebtedness, and other securities, subject to the limitations imposed upon banking associations as to investments, and to convert the same into cash and other securities;

* * * * * * *

3. To take, accept, and hold on deposit for savings account or for safekeeping, or in escrow, or for investment, any and all moneys, bonds, stocks, and other securities, or personal property whatsoever. * * *

* * * * * * *

5. To provide by its bylaws and regulations for the payment of interest or dividends, for the investment of moneys, and conditions for repaying or withdrawing the same. * * *

* * * * * * *

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scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended by withdrawing jurisdiction over these corporations from the bankrutcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed, to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking laws, with banking privileges and powers, operated though it was under those laws, and now being liquidated, as it is, under them.

In the assessment of such power and authority, this Court has previously provided a generalized interpretation of the term "banking corporation" under Section 4 of the Bankruptcy Act:

> [In 1910, at the time of the adoption of the "banking corporation" exception], the ordinary conception of a bank was of a business which was based primarily on the receipt of deposits (general or special), which deposits were used by the bank for loans, discounts, buying and selling commercial paper, and other business purposes. None but national banks could then issue bank notes as currency. The prime incentive in engaging in the business was the profit to be made, directly or indirectly, from the use of deposits. Most of the then existing state legislation concerning banks had as its principal purpose the protection of such depositors. Much of the right to regulate banks was the public interest in protecting depositors. Banking has been a development, and the above was its status in 1910. Other businesses might and did, and still do, deal in commercial paper, make loans or borrow money without any one thinking of them as banks. When a business takes deposits and then does the above or related things, every one knows it is doing a banking business. * * * In short, while there may be other attributes which a bank may possess, yet a necessary one is the receipt of deposits which it may use in its business.

Gamble v. Daniel, supra, 39 F.2d at 450-51. *See Oulton v. German Savings and Loan Society,* 84 U.S. (17 Wall.) 109, 118-19 (1872).

Pursuant to Section 6-05-08, First American had the authority to receive savings deposits. The evidence supports the finding of the Bankruptcy Court that the principal business of First American was actually that of receiving savings deposits, making loans, cashing checks, and issuing drafts and other bills

of exchange.[5] There is no contention that such deposits were not used by First American in its business.

Section 6-05-08 has been held not to provide implied authorization for "trust companies" to accept and pay out demand deposits. *Nelson v. Dakota Bankers Trust Co., supra,* 132 N.W.2d at 910. The inability of First American to undertake demand deposits distinguishes it from status as a "state banking association" under North Dakota law. Section 4 of the Bankruptcy Act, however, does not exclude "banks"; it is addressed to "banking corporations." Under Chapter 6-05, North Dakota law establishes a corporation, which it terms a "banking institution," which may conduct as its primary business the receipt of savings deposits, extension of loans, cashing of checks, and issuance of drafts and other bills of exchange. Such a business is clearly, even in the absence of demand deposits, that of banking. *See Kansas ex rel. Boynton v. Hayes, supra,* 62 F.2d at 600; *Gamble v. Daniel, supra,* 39 F.2d at 450-51. *See also Oulton v. German Savings and Loan Society, supra,* 84 U.S. (17 Wall.) at 118-19. Deposits need not be payable on demand; the test under *Gamble v. Daniel* is whether they may be used in the company's business. 39 F.2d at 451.

The entities excluded under Section 4 of the Bankruptcy Act have these things in common: (1) they are extensively regulated by well-organized departments of the states and of the United States; (2) they are subject to express statutory procedures for liquidation; and (3) the nature of their business is public or quasi-public and involves interests other than those of creditors. *See In re Israel-British Bank (London) Ltd.*, 401 F. Supp. 1159, 1170-74 (S.D.N.Y. 1975). *See also In re Union Guarantee &*

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[5] The general ledger balance statement of First American dated March 4, 1975, reflected the following deposits:

Passbook Svgs Deposits	[$]	172,964.16
Certificates of Deposit		1,474,168.26
Dealer Reserve Deposits		1,070.31
Escrow Deposits		1,529.93
TOTAL TIME DEPOSITS	[$]	1,649,732.66

Mortgage Co., supra, 75 F.2d at 984-85; *Woolsey v. Security Trust Co., supra,* 74 F.2d at 337; *In re Equity Funding Corp. of America,* 396 F. Supp. 1266, 1275 (C.D. Cal. 1975); *In re Supreme Lodge of the Masons Annuity,* 286 F. 180, 184 (N.D. Ga. 1923). The classification of First American by North Dakota as a "banking institution," the substantial powers which it exercises lawfully in the area traditionally associated with banking, the existence of an extensive state statutory and regulatory scheme for supervision and eventual liquidation of "banking institutions" in that state, and the obvious quasi-public nature of the business form a substantial framework from which the Bankruptcy Court and the District Court could properly conclude that First American was an excluded "banking corporation" and that it therefore could not frustrate state processes by seeking the safe harbor of the Federal Bankruptcy Act.[6] The findings below are thus not clearly erroneous and the order dismissing the petition for lack of subject matter jurisdiction must be affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[6] It is thus seen that under the many provisions of the statutory law of this state trust companies are made banking corporations. That it was not intended by the Legislature of the State that trust companies should be operated, or, in case of insolvency, the affairs of such corporations should be wound up in bankruptcy, the assets converted into cash and distributed under the provisions of the Bankruptcy Act, and that a discharge of the corporation, and its stockholders and directors should be granted from its remaining indebtedness. Of course, it is undoubtedly within the power of Congress to make trust companies of the state, or any other natural or corporate body, or unincorporated company subject to the National Bankruptcy Act, and, if this were done in clear and unequivocal terms, all state laws for their operation in conflict with the act must then be held to yield to the higher force, the national law. But, in the absence of any such express provision of the National Bankruptcy Act, in view of the state laws to which we have referred, and others, it must be held, we think, the provisions of the National Bankruptcy Act do not apply. *Kansas ex rel. Boynton v. Hayes,* 62 F.2d 597, 599-600 (10th Cir. 1932).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In Re First American Bank & Trust Company, Bankrupt. First American Bank & Trust Company, Appellant, v. Harry W. George, Receiver, First American Bank & Trust Company, Appellee.	Appeal No. 75-1771

Notice of Appeal to the Supreme Court of the United States

I

Notice is hereby given that the First American Bank and Trust, Company, the Appellant and Bankrupt above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the voluntary bankruptcy petition of the above named bankrupt, entered in this action on the 22nd day of July, 1976.

This appeal was taken pursuant to 11 U.S.C.A. Section 47(c).

II

The clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

The entire record in this Court pursuant to Rule 12(1) of the Supreme Court Rules.

III

The following questions are presented by this appeal: Whether the appellant falls within the narrow exception to Section 4 of the Bankruptcy Act.

Dated this 17th day of August, 1976.

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